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No. 78-1721

In the Supreme Court of the United States

OCTOBER TERM, 1978

WLLE, INCORPORATED, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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Petitioner contends that the failure of the court of appeals to write a longer opinion in reviewing and affirming a decision of the Federal Communications Commission deprived petitioner of due process.

1. The Federal Communications Commission after a full evidentiary hearing revoked the license of radio station WLLE, Inc. The basis for the revocation was WLLE's flagrant and protracted fraudulent billing activities. During a two-year period WLLE overcharged 120 advertisers at least $68,000 by billing them for advertisements that were never broadcast (Pet. App. 6a). The station also engaged in a double billing conspiracy

with local Gulf Oil stations that defrauded Gulf Oil Company of thousands of dollars (Pet. App. 6a-8a).[1]

WLLE's president and majority stockholder, Wallace Hankin, admitted that the station had committed fraud,[2] but claimed that he had been unaware of it. The Commission, however, found that Hankin, who himself was in charge of WLLE's billing (Pet. App. 4a-5a & n.4), could easily have uncovered the overbilling scheme by cross-checking the bills[3] against the program logs (*id.* at 10a-11a). The Commission also found that the double billing fraud against Gulf Oil was so flagrant that Hankin knew or should have known of its existence (*id.* at 8a-10a). It concluded that the station's fraudulent billing was so pervasive that it necessarily resulted from an almost total abdication of licensee responsibility (*id.* at 12a, 18a). Accordingly, it revoked WLLE's license (*id.* at 18a).[4]

The court of appeals (McGowan, Leventhal and MacKinnon, JJ.), after full briefing and oral argument, affirmed (Pet. App. 1a). Although the court did not write

[1]Gulf had agreed to pay 50% of the advertising costs incurred by its local dealers. WLLE and the local dealers sent affidavits to Gulf falsely marked "paid," which showed advertising costs equal to twice those actually incurred. Gulf would then remit half that amount—the full amount of actual costs—and the dealers forwarded payment to WLLE. As a result local dealers in effect received free advertising from WLLE (Pet. App. 6a-8a).

[2] WLLE stipulated to the facts establishing fraudulent billing (Pet. 6).

[3]Hankin signed an affidavit on each bill attesting that the commercials being billed had in fact been broadcast (Court of Appeals Joint Appendix at 136-137).

[4]The Commission found that there were no significantly mitigating factors and thus overruled the recommendation of its Administrative Law Judge that only a $10,000 forfeiture be assessed (Pet. App. 8a).

a formal opinion, it explained that its affirmance rested on "the decision of the * * * Commission * * * and for the reason that there is substantial evidence in the record in support of that decision" (*ibid.*). WLLE's petition for rehearing and suggestion for rehearing en bnc were denied (Pet. App. 64a-65a).

2. Petitioner's contention that the brevity of the court of appeals' opinion deprived it of due process (Pet. 2) is insubstantial. There is no requirement that courts of appeals must write any opinion in affirming the judgment of a lower court or the decision of an administrative agency. As this Court stated in *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 4 (1972) (emphasis supplied), "the courts of appeals should have wide latitude in their decisions of *whether or how* to write opinions." A substantial number of the judgments entered by the courts of appeals are entered without opinion,[5] and the discretion of the courts in that respect is essential to the efficient and expeditious administration of crowded calendars. Affirmance without opinion, or with a brief opinion, is particularly reasonable in cases like this, where the petitioner's principal challenge is to the factual determinations, including the resolution of conflicting testimony and evidence, by the administrative agency and the principal issue on review is whether there is substantial evidence to support the agency's decision.[6]

[5]Similarly, this Court decides the majority of appeals to it by affirming without opinion. R. Stern and E. Gressman, *Supreme Court Practice* 318 (5th ed. 1978).

[6]Although petitioner does not present for this Court's refview the question whether substantial evidence supported the Commission's decision, the crecord evidence fully supports the finding that Hankin either knew or should have known of his staff's fraudulent activities. Revocation of the license in these circumstances fully accords with

In this case, moreover, contrary to petitioner's contention, the court of appeals did clearly explain the basis for its decision, albeit concisely. It stated that its affirmance of the Commission's decision rested on its agreement with the reasoning in the Commission's opinion and its finding of substantial evidence to support the Commission's decision (Pet. App. 1a). That the court did not restate at length reasons amply stated in the Commission's opinion is a fair and sensible means to conserve overtaxed judicial resources.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Commission precedent. See, *e.g.*, *White Mountain Broadcasting Co.* v. *FCC*, No. 76-2009 (D.C. Cir., Apr. 9, 1979); *Eastminster Broadcasting Corp.*, 58 F.C.C. 2d 24 (1976), aff'd without opinion, 559 F. 2d 187 (D.C. Cir. 1977); *Monroe Broadcasters, Inc.*, 60 F.C.C. 2d 792 (1976).

[7]Petitioner's related argument (Pet. 2) that the court of appeals did not "resolve" the issues presented is frivolous. The court resolved them by ruling against petitioner. Petitioner doubtless is displeased with the resolution, but it has chosen not to put in issue before this Court the questions unsuccessfully urged in the court of appeals (Pet. 2).

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